Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

No. 04-313

In The Supreme Court of the United States

PORTLAND PUBLIC SCHOOLS,
SUSAN WINTHROP, and ROBERT CREBO,

Petitioners,

v.

PAMELLA E. SETTLEGOODE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Portland Public Schools and two of its administrators, Susan Winthrop and Robert Crebo (collectively, the Portland Schools) seek certiorari on the grounds that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power". Petition at 5. In every stage of this proceeding the Portland Schools have alleged misconduct or irregularity. After the jury rendered its verdict in this case the Portland Schools alleged that trial attorney Kafoury had committed misconduct during trial, even though Portland Schools failed to object to the alleged misconduct during trial. *Settlegoode v. Portland Public Schools*, 371 F.3d at 503, 517 (9th Cir. 2004). Portland Schools also alleged juror misconduct based upon a juror's statement to the press that the jury intended to send a message to the school district with its verdict. The trial court properly denied Portland Schools' Motion 9. Appendix at 143. Neither of the misconduct allegations were well founded in law or fact. Similarly, the claim that the Ninth Circuit has so far departed from its usual course is unfounded.

The Portland Schools' petition is based on the assertion that the panel only used a single footnoted sentence to dispose of the Portland Schools' claim that Dr. Settlegoode failed to challenge the District Court's Order granting a new trial. Petition at 5 ("in a single footnoted sentence . . . "). However, after the mandate was issued, Portland Schools filed a motion to recall the mandate. The Order denying the motion to recall the mandate expressly addressed Portland Schools concern that the panel had not considered Portland Schools' contentions, to wit:

> They merely resurrect the argument that Plaintiff waived her challenge to the District Court's

> grant of a new trial. Defendants raised this argument before the panel, and we rejected it. None of our colleagues called for a vote on the petition for rehearing en banc. Order, Resp. App. at 2.

The Ninth Circuit found that in granting the Portland Schools' motion for new trial the Magistrate Judge applied the wrong burden of proof standard – even though the jury had been properly instructed on the burden of proof. The crucial issue in the case was whether Portland Schools would have fired Dr. Settlegoode if she had not repeatedly complained about the way disabled students were treated in Portland Schools. The jury specifically found that the defendants did not prove by a preponderance of the evidence that they would not have renewed Dr. Settlegoode's contract for reasons other than Dr. Settlegoode's protected speech. *Settlegoode*, 371 F.3d at 512. The Appellate Opinion quotes a paragraph of the Magistrate Judge's opinion in which the Magistrate Judge shifted the burden of proof onto Settlegoode. Further, the Court of Appeals found that the jury's verdict was "amply supported by the record, regardless of where the burden of proof falls". *Settlegoode*, 371 F.3d at 512, n.6.

Finally, the Court of Appeals noted that the Magistrate Judge should have only overturned the jury's verdict if it was "seriously erroneous". The Court of Appeals could not "see how the jury's finding could possibly be deemed seriously erroneous".[1] The Magistrate Judge, "started off on the wrong foot by failing to acknowledge the jury's determination of the issue",[2] applied the wrong burden of

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[1] *Settlegoode*, 371 F.3d at 514.

[2] *Settlegoode*, 371 F.3d at 513.

proof,[3] and overturned a verdict amply supported by the record.[4] The Ninth Circuit properly reinstated the jury's verdict. Even assuming for the purpose of argument that Settlegoode did not appeal the grant of a new trial based on the insufficiency of evidence, the Magistrate Judge committed plain error which the Ninth Circuit corrected.

Portland Schools does not complain of any evidence that was improperly submitted to the jury, nor does it complain that the jury was improperly instructed as to the law. The Court of Appeals expressly found that there was ample evidence to support the jury's verdict. Under these circumstances, a new trial would be an injustice.

The Ninth Circuit expressly rejected the issue raised by Portland Public Schools on two separate occasions. Whether the Ninth Circuit concluded that plaintiff's brief, when read as a whole, adequately raised the issue, or instead corrected the Magistrate Judge's ruling on a plain error basis is unknown. What is for sure is that the Magistrate Judge committed plain error. There is no split in the circuits over whether an Appellate Court can remedy plain error.

Portland Schools asserts that "the law of all the circuits – including the Ninth Circuit – precludes the Court from addressing issues not raised in an opening brief." Petition at 9. This is simply wrong. *Koerner v. Gvigas,* 328 F.3d 1039 (9th Cir 2003); *United States v. Vllah*, 976 F.2d 509 (9th Cir 1992). The Supreme Court has also reserved the authority to address a matter that has not been assigned as error. *Silber v. United States*, 82 S. Ct.

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[3] *Settlegoode*, 371 F.3d at 511, 512.

[4] *Settlegoode*, 371 F.3d at 512 n.6.

1287 (1902). See also, *Rules of the Supreme Court of the United States*, Rule 24(a) ("At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide".)

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAMELA E. SETTLEGOODE, Plaintiff-Appellant, v. **PORTLAND PUBLIC SCHOOLS, Multnomah School District No.1; SUSAN WINTHROP; ROBERT CREBO; LARRY WHITSON,** Defendants-Appellees.	No. 02-35260 D.C. No. CV-00-00313-ST **ORDER** (Filed July 26, 2004)

Before: **D.W. NELSON, KOZINSKI** and **McKEOWN**, Circuit Judges.

Defendants seek recall of the mandate pending the filing of a writ of certiorari in the United States Supreme Court.

The Supreme Court discussed the standard for determining whether recall of a mandate is justified in *Calderon* v. *Thompson*, 523 U.S. 538 (1998), a case defendants do not cite. As *Thompson* explains, the power to recall the mandate is a power "of last resort," one that is to be used "only in extraordinary circumstances" and "held in reserve against grave, unforeseen contingencies." *See id.* at 550.

Apparently unaware of the applicable legal standard, defendants come nowhere near satisfying it. They merely resurrect the argument that plaintiff waived her challenge to the district court's grant of a new trial. Defendants raised this argument before the panel, we rejected it. None of our colleagues called for a vote on the petition for rehearing en banc. *See* Fed. R. App. P. 35.

Issuing the mandate will not frustrate defendants' ability to petition for certiorari. Even if the judgment were satisfied before the Supreme Court could rule on a certiorari petition, that would not render the petition moot. It would simply require that, were defendants to prevail, plaintiff repay the judgment. If defendants have legitimate concerns that plaintiff will dissipate or hide the money prior to final resolution of the case by the Supreme Court, they may petition the district court for an order requiring plaintiff to post security or for alternative safeguards.

Whatever equities weigh in defendants' favor fall short of the "extraordinary circumstances" required by *Thompson*. *See* 523 U.S. at 550. Further, these equities are offset by the harm plaintiff would suffer by being deprived for several additional months of a judgment she won over two years ago.

The motion to recall the mandate is DENIED.